

*KADISH
SCHULHOFER*

*CRIMINAL LAW
AND ITS PROCESSES
Cases
and
Materials*

*Seventh
Edition*



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**CRIMINAL LAW
AND ITS PROCESSES**

CASES AND MATERIALS

SEVENTH EDITION

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PREFACE

We have tried in this edition to freshen the material while at the same time maintaining close continuity with it. Thus we have left unaltered the basic organization, tone, and perspective of the book. We have replaced relatively few of the major cases, only doing so to improve teachability or to introduce new developments. Most of the changes have been in the reorganization of some chapters and in the Notes and Problems, where we try to present the most interesting ideas in the non-case literature, as well as new issues of importance.

Why *substantive criminal law*? We conceive of a criminal law course as serving the ends of both general legal education and training in the criminal law in particular. There are, as we see it, three chief ways the course can contribute to the general legal education of the law student. One way is to provide a vehicle for the close reading of statutory texts — primarily the Model Penal Code, but also state statutory formulations — to help balance the emphasis on case law in the first-year curriculum.

The second way is to introduce the student to the operation of a system of rules and principles designed to apportion blame and responsibility in accordance with our moral norms, subject to the practical restraints of a functioning system. While the criminal law is the primary institution serving this function, fault and wrongdoing each play a role in determining liability throughout the law. Hence some understanding of the analytical elements in assessing blame for a person's conduct or for the conduct of another, and of the concepts of excuse and justification, is an important element in a lawyer's legal education.

The third way the criminal law course serves the purposes of general legal education is by enlarging insight into the potentialities and limitations of the law as an instrument of social control. We have in mind the hard problems encountered in using the law for this purpose: the difficulty of giving legal form to the compromises made necessary when goals conflict; the creation of institutional arrangements — judicial and administrative — appropriate to the goals sought; the limitations — moral and practical — on the use of the law as a means of social control; the relation of legal controls to other social processes.

The substantive criminal law provides an unusually suitable introduction to these pervasive problems of the law. The ends criminal law serves involve social and human values of the highest order. Its means, entailing the imposition of brute force on the lives of individuals, are potentially the most destructive and abusive to be found within the legal system. The issues it raises and the setting in which it raises them are compelling and vivid. Its institutions are acutely controversial and often controverted. And one of its underlying themes is the momentous issue of the reconciliation of authority and the individual. As Professor Herbert Wechsler has written:

Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.¹

What of the course's narrower purpose of training students in the criminal law in particular? Here there are two main pedagogic objectives. One is to furnish a solid foundation for those who will, in greater or lesser degree, participate directly in the processes of the criminal law. This foundation does not require mastery of the full range of technical skills and information held by the practicing criminal lawyer or administrator, but rather the development of confidence in handling principles and rules — judge-made or statutory — through knowledge about the larger implications of the doctrines and institutions of the criminal law. The second purpose is to create in law school graduates who will have little occasion to practice criminal law an understanding of the problems of the criminal law. As influential members of their communities — and more directly as judges, legislators, or teachers — lawyers versed in the principles of criminal law can bring an informed intelligence to the challenge of solving some of the most vexing problems of our times.²

Revisions for the seventh edition. In the procedural sections (Chapter 1), we have streamlined the materials but have retained those fundamentals of criminal trial procedure that we consider essential for understanding the issues in substantive criminal law (rules of evidence, burden of proof, presumptions, and the role of the jury). These topics can now be covered in several classes. We believe that a brief but intensive treatment of this material at the outset of the course adds immeasurably to the student's appreciation of the concrete setting in which substantive law issues arise and the practical considerations that so often influence those debates. We have retained in Chapter 1 a substantial but more tightly edited section dealing with the ethical responsibilities of the criminal defense attorney. The themes of this section are central to the study and practice of law, and we believe that students can profit from exposure to these themes early and often in their legal education.

The growing complexity and importance of sentencing procedure and sentencing guidelines pose a dilemma for an introductory criminal law course. The subject is too important to be ignored but too complex to be covered comprehensively. We have sought to strike an appropriate balance by providing in Chapter 2 both a textual summary of current sentencing procedures and a principal case that can serve as a focal point for discussion in class. Though brief and tightly edited, the material is sufficient to illustrate for students the mechanics of how guidelines work, as well as the tough jurisprudential issues underlying them.

1. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1087-98 (1952).

2. For a fuller discussion of the role of the criminal law course in a law school curriculum, see Sanford H. Kadish, *Why Substantive Criminal Law — A Dialogue*, 29 Clev. St. L. Rev. 1 (1980).

In the substantive sections we have updated the cases, added Notes and Problems dealing with issues of current concern, and done some reorganization of the material. For example, we have tried in the provocation section and the mental disorder chapter to tighten (as well as lighten) the presentation of material, and in the rape chapter to cover some of the expanding issues, as well as to permit sustained attention to statutory drafting and interpretation. Among the new principal cases are *City of Chicago v. Morales* (vagueness and new strategies of policing); *Commonwealth v. Fischer* (mistake of fact in rape); *State v. Guthrie* (premeditation); *People v. Kevorkian* (assisted suicide and causation); *Public Committee Against Torture v. State of Israel* (necessity defense); and *Washington v. Glucksberg* (euthanasia).

As in previous editions, the substantive materials continue to focus on imparting an understanding of what is often called the “general part” of the criminal law — that is, those basic principles and doctrines that come into play across the range of specific offenses (for example, *actus reus*, *mens rea*, and the various justifications and excuses). We believe that mastery of the detailed elements of many particular crimes is not an appropriate goal for a basic criminal law course. Nevertheless, we have found that understanding of the basic principles is enhanced by testing their applications and interactions in the context of particular offenses. Accordingly, we examine in detail three offense categories: rape (Chapter 4), homicide (Chapter 5), and theft (Chapter 9). The chapter on rape provides an opportunity to focus on the definitional elements of a major crime in a context that has become the focus of acute controversy because of changing perceptions and changing social values. The theme of the homicide chapter is the task of legislative grading of punishment in a particularly challenging area. The theft chapter explores the significance of history and the continued impact of old doctrinal categories on the resolution of thoroughly modern difficulties in defining the boundaries of the criminal law.

Use of the materials in diverse teaching formats. Over the years, law schools have experimented with a variety of formats for the basic criminal law course. Although the year-long five- or six-hour course remains common, some schools offer criminal law as a four- or even three-hour course, and some schedule the course in the first or second semester or even in the second or third years. Under these circumstances, a short book designed to be taught straight through, without adjustments or deletions, is bound to prove unsatisfactory for many users. In preparing the seventh edition, we have sought to edit the materials tightly enough to avoid significant surplusage for the average course, but we have not attempted to preempt all possible judgments about inclusion and exclusion. Rather, we thought it essential to allow for teachers to select topics that accord with their own interests and with the curricular arrangements at their own schools. Thus, we have aspired to create a flexible teaching tool, one that reflects the rich diversity of the subject. For the five- or six-hour, year-long course, the book can be taught straight through, perhaps with some minor deletions. For a four-hour course, and especially in the case of a three-hour course, substantial omissions will be necessary. The Teachers Manual presents detailed suggestions for appropriate coverage and focus, together with specific suggestions for sequencing and class-by-class assignments.

Collateral Reading. There are a number of useful readings for students interested in pursuing further the questions developed in this casebook. Some of the

suggestions that follow may no longer be in print, but they are available in virtually all law libraries.

Comprehensive Works: The following publications should be of considerable use to the student:

American Law Institute, Model Penal Code and Commentaries (1980-1985). This is a 6-volume set containing the text and supporting commentaries of the Model Penal Code. The commentaries constitute the most comprehensive available examination of the American substantive criminal law.

Encyclopedia of Crime and Justice (S. H. Kadish ed., Macmillan and Free Press, 1983). This work contains relatively short treatments, written by experts for the general lay reader, on virtually all the subjects covered in this casebook. It should prove particularly helpful for orientation and perspective. A second edition is in preparation under the editorship of Professor Joshua Dressler.

Textbooks: There are several conventional textbooks that are useful for review purposes:

Wayne LaFare, *Criminal Law* (West Publishing Co., 3d ed. 2000). A widely used hornbook; comprehensive and heavily footnoted.

Joshua Dressler, *Understanding Criminal Law* (Matthew Bender, 2d ed. 1995). A shorter textbook, available in paperback; its coverage largely focuses on the subjects covered in this casebook.

In addition, students may wish to consult English materials. Professor Glanville Williams has written two outstanding accounts of the criminal law: *Criminal Law: The General Part* (2d ed. 1961) and *Textbook of Criminal Law* (2d ed. 1983). The latter addressed specifically to law students.

Monographs: The following books deal selectively with aspects of the criminal law:

George Fletcher, *Rethinking Criminal Law* (Little, Brown, 1978): A comparative and theoretical treatment of the criminal law that is critical of dominant thinking in the field. See also Fletcher's more recent *Basic Concepts of Criminal Law* (Oxford Univ. Press, 1998).

H. L. A. Hart, *Punishment and Responsibility* (Oxford University Press, 1968): A collection of powerfully argued essays that have had a great influence on contemporary thinking concerning issues of punishment and excuse.

Sanford H. Kadish, *Blame and Punishment—Essays in the Criminal Law* (Macmillan, 1987): Authored by one of the editors of this casebook, a collection of essays, most of which grew out of the experience of teaching prior editions.

Herbert Packer, *The Limits of the Criminal Sanction* (Stanford, 1968): A classic treatment of the problems of criminalization and the theory of punishment.

Style. Citations in the footnotes and text of extracted material have been omitted when they did not seem useful for pedagogical purposes, and we have not used ellipses or other signals to indicate such deletions. Ellipses are used, however, to indicate omitted text material. Where we have retained footnotes in readings and quotations, the original footnote numbers are preserved. Our own footnotes to excerpts and quotations from other works are designated by letters, while footnotes to our own Notes are numbered consecutively throughout each chapter.

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